IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1501

DONALD WELDON IVEY, GORDON MAJOR PIRKLE, MARSHALL PYRON, JR., and CHARLES CLEON ANDERSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OSCAR B. GOODMAN, ESQ.
Goodman and Snyder
230 Las Vegas Blvd. South
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorney for Petitioner:
CHARLES CLEON ANDERSON

H.A. STEPHENS, JR., ESQ.
CHARLES R. SMITH, ESQ.
Smith & Smith
2334 National Bank of
Georgia Building
34 Peachtree Street
Atlanta, Georgia 30303

Attorneys for Petitioners:
DONALD WELDON IVEY, GORDON MAJOR PIRKLE and MARSHALL PYRON, JR.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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The Petitioners, DONALD WELDON IVEY, GORDON MAJOR PIRKLE, MARSHALL PYRON, JR., and CHARLES CLEON ANDERSON, respectfully pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 16, 1976.

OPINION BELOW

The opinion below was rendered on March 16, 1976, by the United States Court of Appeals for the Fifth Circuit. The opinion is unpublished and apparently will not be published. A copy of the opinion is attached hereto as Appendix "A".

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

1. Whether 18 U.S.C. § 2518(1)(b)(iv) requires the identification in a wiretap application of all persons who the Government has probable cause to believe will participate in conversations over the telephone line to be intercepted, and whose conversations relate to the illegal activity for which the wiretap application is submitted; and if such identification is required, whether failure by the Government to so identify is grounds for suppression of the seized conversations.

STATUTES INVOLVED

18 U.S.C. § 2518. Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication *shall* be made in writing upon oath or affirmation to a judge of competent jurisdiction and *shall* state the applicant's authority to make such application. Each application *shall include* the following information:

* * *

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including . . . (iv) *the identity of the person, if known, committing the offense and whose communications are to be intercepted;*

* * *

(4) *Each order authorizing* or approving the interception of any wire or oral communication *shall* specify –

(a) *the identity of the person, if known, whose communications are to be intercepted;*

* * *

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that –

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval. (Emphasis Supplied)

STATEMENT OF THE CASE

Petitioners herein, together with eight (8) other co-defendants not herein involved, were indicted by a Federal Grand Jury sitting in the Northern District of Georgia, Atlanta Division, on May 21, 1974. The indictment charged Petitioners with violating 18 U.S.C. § 1955 and 371, illegal gambling business and conspiracy. Following entry of not guilty pleas, various motions were filed, including motions to suppress the results of a court-authorized wire interception which led to the indictment. Said motions were denied by the District Court. The Petitioners proceeded to trial by the Court without a jury, and all four Petitioners were found guilty of both counts of the indictment.

The order for wire interception in this case was issued upon an application filed by J. ROBERT SPARKS, Special Attorney for the United States Department of Justice; attached to and incorporated into Mr. SPARKS' application was an affidavit of a Special Agent of the Federal Bureau of Investigation containing factual allegations attempting to establish the requisite probable cause necessary to obtain the interception order. The application requested authorization to intercept wire communications of Petitioner PIRKLE and others as yet unknown. The order authorizing interceptions named only Petitioner PIRKLE and "other persons as yet unknown." Numerous conversations of three of the Petitioners were intercepted pursuant to this order and these intercepted communications were used during the trial (Petitioner ANDERSON was not overheard during these interceptions). Following the trial, convictions and sentencing, these Petitioners all appealed the judgments

to the United States Court of Appeals for the Fifth Circuit and that Court affirmed.

The threshold question of whether or not probable cause existed as to individuals other than Petitioner PIRKLE known to be committing the offenses for which interception was requested and ordered over the telephone subjected to the interceptions presents the issue herein clearly. The trial court found, and the Government conceded, that there was probable cause to believe that all four of these Petitioners had committed and were committing the offense for which the application for wire interception was submitted. The Court below ruled against Petitioners on whether the Government had probable cause to believe it would intercept conversations of Petitioners IVEY, PYRON and ANDERSON over the telephone for which interception was authorized.

Applying the standard of probable cause, a detached observer would clearly find the Government had probable cause to name Petitioners IVEY, PYRON and ANDERSON in its wiretap application.

The affidavit submitted in support of the application for wire interception clearly establishes probable cause to believe that these Petitioners were committing the offense; in fact, the application so states and the Government conceded this fact in its answer to the motion filed in the District Court. A careful reading of the affidavit for wire interception and the affidavit which was submitted in support of an earlier application for an order authorizing the use of a Pen Register also, it is submitted establishes probable cause to show that communications of these Petitioners would be intercepted. In the affidavit submitted in support of wire interception, there is listed certain

telephone numbers dialed from the phone to be intercepted (these facts were gathered by the use of a previous Pen Register which was authorized to be used on the phone by court order). This affidavit stated that one of the phone numbers dialed from the phone for which interception is requested is *known* to be used by Petitioner PYRON. This affidavit also contained a statement that Defendant PYRON advised confidential source number three that he, PYRON, is in "a key position in the numbers lottery business, which requires PYRON to make periodic contact with other members of this numbers lottery operation."

The affidavit submitted in support of an order authorizing the use of a Pen Register, which was incorporated and made a part of the affidavit for wire interception, stated that "a short time after the winning number is received at the 'bank', it is disseminated, *usually by telephone,* to other persons engaged in the numbers lottery." The affidavit in support of the Pen Register order also stated that this "lottery operation is conducted principally by telephone," according to the Federal Bureau of Investigation informants. The Pen Register affidavit stated that the "telephonic activity of the 'bank' and 'relay stations' are more voluminous" during the afternoon than at other times (explanations of these terms and which Petitioners fit the description are located at various places within both affidavits.) Finally, this affidavit stated that Petitioner PIRKLE remains in telephone contact with employees of the lottery during the day.

It is submitted that all of these facts, when read in light of the entire affidavits, established probable cause to believe that communications of the other Petitioners would be intercepted, requiring their being named in

the application and order as persons known whose communications were to be intercepted.

REASON FOR GRANTING THE WRIT

I.

THE GOVERNMENT FAILED TO IDENTIFY IN THE WIRETAP APPLICATION PERSONS WHO THE GOVERNMENT HAD PROBABLE CAUSE TO BELIEVE WERE COMMITTING THE OFFENSE AND WHOSE COMMUNICATIONS WERE TO BE INTERCEPTED; SUCH FAILURE TO SO IDENTIFY REQUIRES SUPPRESSION OF THE SEIZED CONVERSATIONS.

Title 18, United States Code, Section 2518(1)(b)(iv) has been interpreted by this Court in *United States v. Kahn,* 415 U.S. 143 (1974). This Court stated, at 415 U.S. 155:

> "We conclude, therefore, that Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that the individual is 'committing the offense' for which the wiretap is sought."

This Court, in *United States v. Giordano,* 416 U.S. 505 (1974), held, at page 527:

> "We think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the Congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device."

In *United States v. Chavez*, 416 U.S. 562, 574, 575 (1974), this Court stated:

> "We did not go so far as to suggest that every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful' . . . suppression is not mandated for each violation of Title III, but only if "disclosure' of the contents of the intercepted communications, or derivative evidence, would be in violation of Title III."

And, at page 580, this Court held:

> "Though we deem this result to be the correct one under the suppression provisions of Title III, we also deem it appropriate to suggest that strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought."

Title 18, U.S.C. § 2518(1)(b)(iv) requires that when the Government applies for a wiretap authorization, the "identity of the person, if known, committing the offense and whose communications are to be intercepted" must be disclosed.

There can be no doubt in this case that Petitioners DONALD WELDON IVEY, MARSHALL PYRON, JR. and CHARLES CLEON ANDERSON were "known." In fact the Government in its brief to the Fifth Circuit admitted that "probable cause to believe" that these three individuals were persons engaged in the unlawful lottery existed. Neither can there be any doubt that this same probable cause existed that these three would be intercepted over the telephone line for which the wiretap was sought.

The decision rendered by the United States Court of Appeals for the Fifth Circuit in this case conflicts with decisions in three other Courts of Appeal. *United States v. Bernstein*, 509 F.2d 966 (4th Cir., 1975) *cert. pending*, No. 74-1486, filed 5/27/75; *United States v. Donovan*, 513 F.2d 337 (6th Cir., 1975) *cert. granted*, No. 75-212; *United States v. Moore*, 513 F.2d 485 (D.C. Cir., 1975) petition for rehearing *en banc* pending.

In *United States v. Bernstein, supra*, the Court held in dealing with this section of Title III:

> "We conclude from the unequivocal language of Title III that Congress intended any unlawful invasion of an aggrieved person's privacy to be sufficient harm in itself to require suppression. " 'prejudice is not an element of the definition' " [of an aggrieved person]. 509 F.2d at 1004.

The Court in *United States v. Donovan, supra*, stated:

> "Since Congress has imposed a clear requirement that the identity of the participants must be disclosed 'if known,' we are not concerned with the reason that these names were omitted from the application. In our view it makes no difference whether the omission was inadvertent or purposeful. The fact of omission is sufficient to invoke suppression." 513 F.2d at 341.

Petitioners herein contend that review by this Court is presently necessary to resolve the established conflict among the Circuits.

CONCLUSION

For the foregoing reason, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted:

OSCAR B. GOODMAN, ESQ.
Goodman and Snyder
230 Las Vegas Blvd. South
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorney for Petitioner:
CHARLES CLEON ANDERSON

H.A. STEPHENS, JR., ESQ.
CHARLES R. SMITH, ESQ.
Smith & Smith
2334 National Bank of
Georgia Building
34 Peachtree Street
Atlanta, Georgia 30303

Attorneys for Petitioners:
DONALD WELDON IVEY, GORDON MAJOR PIRKLE and MARSHALL PYRON, JR.

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-2267
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DONALD WELDON IVEY, GORDON MAJOR PIRKLE, MARSHALL PYRON, JR., and CHARLES CLEON ANDERSON,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

(March 16, 1976)

BEFORE BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409. Part I.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

No. 75-1501

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that evidence derived from a court-authorized wire interception should have been suppressed because three of them were not named in the intercept application and order.

After a non-jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted of conspiracy to operate and operation of an illegal gambling business, in violation of 18 U.S.C. 371 and 1955. Petitioners Ivey, Pirkle and Pyron received consecutive sentences of two years' imprisonment on each count; the sentences on the second count were suspended in favor of two years'

209-142—76——1

probation. Petitioner Anderson received consecutive sentences of three years' imprisonment on each count; the sentence on the second count was suspended in favor of three years' probation. The court of appeals affirmed on March 16, 1976 (Pet. App. A). The petition for a writ of certiorari was not filed until April 16, 1976, and is therefore out of time under Rule 22(2) of the Rules of this Court. There is in any event no reason to grant the writ.

The evidence established that petitioners operated a large numbers lottery keyed to the dollar volumes of stocks and bonds traded on the New York Stock Exchange (C.A. App. 147–160, 233–234, 321). Some of the evidence in the case was derived from a wire interception of a telephone used by petitioner Pirkle in conducting the illegal numbers business; monitoring of this telephone was authorized under a court order issued by Chief Judge Newell Edenfield, of the United States District Court for the Northern District of Georgia (C.A. App. 125A).

Petitioners contend that the evidence derived from the interception should have been suppressed since Ivey, Pyron and Anderson were not named in the intercept order and application, although, they claim, the government had probable cause to believe that their conversations about the gambling enterprise would be overheard. They rely upon 18 U.S.C. 2518 (1)(b)(iv), which provides that the application should include "the identity of the person, if known,

committing the offense and whose communications are to be intercepted."[1]

1. Only Ivey and Pyron have standing to seek suppression on this basis. Pirkle was named in both the application and order, and Anderson was not in fact overheard during the intercept. Pirkle and Anderson thus claim only that they are entitled to suppression because of an alleged defect in the application and order relating solely to two other persons. They are attempting to assert the rights of others as a basis for suppression of evidence obtained without violation of their own rights. But "standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search." *United States* v. *Calandra*, 414 U.S. 338, 348; see *Brown* v. *United States*, 411 U.S. 223, 229–230. The traditional standing rules were incorporated into the suppression sections of the wire interception statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968. See S. Rep. No. 1097, 90th Cong., 2d Sess., pp. 91, 106 (1968); *Alderman* v. *United States*, 394 U.S. 165, 171–172, 175, n. 9; *United States* v. *Scasino*, 513 F. 2d 47 (C.A. 5); *United States* v. *Gibson*, 500 F. 2d 854 (C.A. 4), certiorari denied, 419 U.S. 1106. Accordingly, since petitioners Pirkle and Anderson cannot

[1] Similarly, 18 U.S.C. 2518(4)(a) requires the order to specify "the identity of the person, if known, whose communications are to be intercepted." This language imposes no broader requirement than the identification provisions of 18 U.S.C. 2518(1)(b)(iv). *United States* v. *Kahn*, 415 U.S. 143, 152.

claim that the omission of an identification of Ivey and Pyron violated any rights of theirs, they have no standing to complain of the failure to identify. *United States* v. *Scully, et al.*, C.A. 9, Nos. 74–2479, 74–2295, 74–1891, 74–1887, decided May 24, 1976.[2]

2. In any event, both courts below rejected the premise of petitioners' claim that Ivey, Pyron and Anderson should have been named in the application and order; the courts concluded that there was no probable cause to believe that their incriminating con-

[2] The decision in *United States* v. *Bellosi*, 501 F. 2d 833 (C.A. D.C.), is not inconsistent with this conclusion. There, the court found that the failure to inform the authorizing judge that the conversations of one of the targets of the proposed interception had previously been intercepted rendered the entire subsequent interception illegal, since that information might have led to the denial of the authorization for the subsequent interception (*id.* at 838–839). Accordingly, the court concluded that the subsequent communications were "unlawfully intercepted" and subject to suppression on the motion of any "aggrieved person" under 18 U.S.C. 2518(10)(a), including any persons who were parties to the improperly intercepted conversations or against whom the interception was directed, 18 U.S.C. 2510(11). But see *United States* v. *Kilgore*, 524 F. 2d 957, 958, n. 1 (C.A. 5), petition for a writ of certiorari pending, No. 75–963. In contrast, here any failure to identify others in the application who might be overheard, when the main target was named, could scarcely have led to the denial of the intercept order and thus did not constitute a significant violation of any mandatory requirement of the Act of the kind involved in *Bellosi*. See the brief for the United States in *United States* v. *Donovan*, No. 75–212, pp. 34–36, a copy of which we are sending petitioners. But see *United States* v. *Picone*, 408 F. Supp. 255, 262 (D. Kan.), appeal pending, C.A. 10, No. 76–1027. Cf. *United States* v. *Chiarizio*, 525 F. 2d 289 (C.A. 2), in which the court assumed without deciding that a named conspirator had standing to object to the failure to name a co-conspirator, but then concluded the objection was without merit.

versations would be overheard on the intercepted phone (C.A. App. 132; Pet. App. 1a).[3] There is no need for this Court to review this essentially factual determination. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.[4]

Although petitioners correctly point out (Pet. 9) that there is a conflict in the circuits on the scope of the naming requirement in wire intercept applications and orders because of different interpretations of 18 U.S.C. 2518(1)(b)(iv) and (4)(a), that conflict is not relevant to this case; no court has implied that persons must be identified in the absence of probable cause to anticipate that they will be overheard en-

[3] As petitioners note (Pet. 5), the affidavit showed that there was probable cause to believe that these three petitioners were involved in the gambling activity (C.A. App. 76–91). But it is clear that the only possibly relevant inquiry is whether there was probable cause to believe they were using the monitored telephone in these activities. See, *e.g.*, *United States* v. *Russo*, 527 F. 2d 1051, 1056 (C.A. 10), certiorari denied, No. 75–1218, June 1, 1976; *United States* v. *Martinez*, 498 F. 2d 464, 468 (C.A. 6), certiorari denied, 419 U.S. 1056.

[4] This conclusion was clearly correct. The only evidence suggesting that any of the petitioners other than Pirkle would be parties to monitored conversations was derived from the previous use of a pen register which indicated that Pirkle had used the target telephone on several occasions to call a telephone number frequently used by petitioner Pyron (Pet. 6). However, a pen register does not reveal the contents of any conversation or the actual parties to the call; it only establishes that a particular call was placed from one telephone to another. *United States* v. *Giordano*, 416 U.S. 505, 549, n. 1 (dissent). The informant cited by petitioners did not mention any use of the target, or any other, telephone (Pet. 6).

gaging in conversations about criminal activities. There is, accordingly, no need to hold this case pending disposition of *United States* v. *Donovan,* No. 75–212, *supra.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.

U.S. GOVERNMENT PRINTING OFFICE: 1976

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OSCAR B. GOODMAN, ESQ.
230 Las Vegas Blvd. South
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorney for Petitioner:
CHARLES CLEON ANDERSON

H. A. STEPHENS, JR., ESQ.
CHARLES R. SMITH, ESQ.
Smith & Smith
2334 National Bank of Georgia Bldg.
34 Peachtree Street
Atlanta, Georgia 30303

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DONALD WELDON IVEY, GORDON MAJOR PIRKLE and MARSHALL PYRON, JR.

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TO: The Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

The Petitioners respectfully pray that this Petition for Rehearing for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be considered.

REASONS FOR FILING PETITION FOR REHEARING

On April 16, 1976, the Petitioners filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit containing one question presented to this Honorable Court (the Writ of Certiorari heretofore filed is incorporated by reference *in toto*). The question herein presented was included in the original petition for a writ of certiorari.

On October 4, 1976, this Honorable Court denied the petition for a writ of certiorari.

QUESTION PRESENTED

1. Whether 18 U.S.C. §2518(1)(b)(iv) requires the identification in a wiretap application of all persons who the Government has probable cause to believe will participate in conversations over the telephone line to be intercepted, and whose conversations relate to the illegal activity for which the wiretap application is submitted; and if such identification is required, whether failure by the Government to so identify is grounds for suppression of the seized conversations.

STATUTE INVOLVED

18 U.S.C. §2518. Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication *shall* be made in writing upon oath or affirmation to a judge of competent jurisdiction and *shall* state the

applicant's authority to make such application. Each application *shall include* the following information:

* * *

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including . . . (iv) *the identity of the person, if known, committing the offense and whose communications are to be intercepted;*

* * *

(4) *Each order authorizing* or approving the interception of any wire or oral communication *shall* specify –

(a) *the identity of the person, if known, whose communications are to be intercepted;*

* * *

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that –

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval. (Emphasis Supplied)

STATEMENT OF THE CASE

The Petitioners herein adopt and incorporate the Statement of the Case as contained in the original Petition for a Writ of Certiorari filed April 16, 1976.

REASON FOR GRANTING THE PETITION FOR REHEARING

I.

THE GOVERNMENT FAILED TO IDENTIFY IN THE WIRETAP APPLICATION PERSONS WHO THE GOVERNMENT HAD PROBABLE CAUSE TO BELIEVE WERE COMMITTING THE OFFENSE AND WHOSE COMMUNICATIONS WERE TO BE INTERCEPTED; SUCH FAILURE TO SO IDENTIFY REQUIRES SUPPRESSION OF THE SEIZED CONVERSATIONS.

In its brief to the Fifth Circuit, the Government admitted that there was probable cause to believe that Petitioners IVEY, PYRON and ANDERSON were persons engaged in an unlawful lottery. In *United States v. Kahn*, 415 U.S. 143 at 155 (1974), this Honorable Court held that where such probable cause exists, Title III requires the naming of that person in the application or interception order. The decision rendered by the Court of Appeals for the Fifth Circuit in the case at bar conflicts with the interpretation rendered in three other Courts of Appeal. See, *United States v. Bernstein*, 509 F.2d 996 (4th Cir., 1975) *cert. pending*, No. 74-1486, filed 5/27/75; *United States v. Donovan*, 513 F.2d 337 (6th Cir., 1975) *cert. granted*, No. 75-212; *United States*

v. Moore, 513 F.2d 485 (D.C. Cir., 1975) *petition for rehearing en banc pending.* Because Certiorari was granted or is pending in the above cited cases and since the issue in those cases is the same as in the case at bar, it is respectfully submitted that to deny Certiorari in the current case would work as an injustice since the issues are identical.

Petitioners herein contend that review by this Court is not only necessary to resolve the conflict among the circuits but also because there is a need for equal application of the law to the Petitioners herein.

This is the first time in counsel's experience that certiorari has been denied on a case where issues are identical to those of cases wherein certiorari has been granted. This leads counsel to believe that perhaps some inadvertance took place in the Supreme Court's denial of certiorari.

CONCLUSION

For the foregoing reason, it is respectfully submitted that this Petition for Rehearing be considered and a Writ of Certiorari issue to review the decision in this case.

Respectfully submitted,

OSCAR B. GOODMAN, ESQ.
230 Las Vegas Blvd. South
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorney for Petitioner:
CHARLES CLEON ANDERSON

H. A. STEPHENS, JR., ESQ.
CHARLES R. SMITH, ESQ.
Smith & Smith
2334 National Bank of Georgia Bldg.
34 Peachtree Street
Atlanta, Georgia 30303

Attorneys for Petitioners:
DONALD WELDON IVEY, GORDON MAJOR PIRKLE and MARSHALL PYRON, JR.

By _____
OSCAR B. GOODMAN

CERTIFICATE OF COUNSEL

OSCAR B. GOODMAN, Attorney for Petitioner CHARLES CLEON ANDERSON and on behalf of the remaining Petitioners, and duly admitted to practice before this Honorable Court, hereby certifies that this petition for rehearing is presented in good faith and is not presented for the purpose of delay.

It is further certified that the petition for rehearing is restricted to the question presented therein, which question presents a substantial ground available to Petitioners, and which presents to this Honorable Court a decision of a Circuit Court of Appeal which is of substantial effect.

_____
OSCAR B. GOODMAN

CERTIFICATE OF SERVICE BY MAILING

The undersigned hereby certifies that three (3) true and correct copies of the above and foregoing Petition for Rehearing for Writ of Certiorari was, on this day of October, 1976, mailed, postage prepaid, to the Honorable Robert Bork, Solicitor General, United States Department of Justice, Washington, D.C. 20530.

_____
C.L.B. PUBLISHERS